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No. ——

In The Supreme Court of the United States

October Term, 1994

United Food and Commercial Workers International Union, AFL-CIO, and Bernard J. Aning, individually and on behalf of a class of others similarly situated,

Petitioners,

v.

John Morrell & Company,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In suits under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185—which are to be decided under a "single body of federal law," *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962) —the Sixth and Fourth Circuits have developed an interpretative rule that treats a collectively bargained promise to provide health insurance to retirees as creating an accrued or vested right in those who retire during the term of the collective agreement. The Eighth and Fifth Circuits have rejected that rule and have derived from their reading of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq., an interpretative rule that, absent express vesting language, treats such promises as creating rights that expire upon the termination of the agreement. The Seventh Circuit, in its turn, has developed a third, multi-factor interpretative rule for determining the legal significance of such promises. Against that background, the question presented here is:

> What is the proper, uniform LMRA § 301 interpretative rule that governs suits on a collectively bargained provision for retiree health insurance.

LIST OF PARTIES

All parties to the proceedings in the lower courts are listed on the front cover of the petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners United Food and Commercial Workers International Union, AFL-CIO, and Bernard J. Aning respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in *John Morrell & Co. v. United Food and Comm. Workers,* Eighth Cir. No. 93-2863 (Oct. 12, 1994).

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 37 F.3d 1302, and is reprinted in the Appendix hereto, at 1a-26a. The order of the Court of Appeals for the Eighth Circuit denying Petitioners' petition for rehearing and suggestion for rehearing *en*

banc, which has not been reported, is reprinted in the Appendix hereto, at 54a.

The opinion of the United States District Court for the District of South Dakota (Battey, J.), is reported at 825 F.Supp. 1440, and is reprinted in the Appendix hereto, at 27a-53a.

JURISDICTION

The decision of the Eighth Circuit was issued on October 12, 1994. Petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc*. An order denying that petition was issued on January 17, 1995. On April 10, 1995, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including May 2, 1995.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Facts

For forty years, respondent John Morrell & Co. ("Morrell" or "the Company") and petitioner United Food and Commercial Workers International Union or its pred-

ecessors ("the Union") have been parties to a set of successive collective bargaining agreements. From 1967 until 1988, each successive contract contained a provision which obligated Morrell, at company expense, to provide to "Employees who retire during the term of the Agreement" or to "Employees who retire on or after" the effective date of the Agreement, and their dependents, health care benefits which were specified in Appendix F to the Agreement.[1] Each agreement was for a three-year term and each stated that the "Hospital-Medical-Surgical Insurance Plan described in Appendix F will remain in effect for the duration of the agreement."

Prior to 1979, Appendix F provided that the health care coverage would terminate at the end of the month in which the retiree died. Since 1979, Appendix F has provided an option under which "coverage shall continue" for dependents after the retiree's death.[2]

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[1] Prior to 1976, the retiree health provision referred not only to those who retired during the term of the Agreement but also to "presently covered retirees" or to "retirees currently furnished . . . coverage." Beginning in 1976, the Company ceased to recognize the Union as the exclusive bargaining representative of past retirees, the language of the Agreement was limited to that quoted in text and the situation of the past retirees was dealt with in company-union negotiations separate from those covering the active employees.

[2] Pursuant to this provision, upon retirement each retiree was given a form entitled "Retirement Information" which stated that "For continued health care benefits for an employee's spouse and dependents beyond the life of the retiree, employee must select a Joint and Survivor Form of Pension." A number of retirees testified that they were told by Morrell that if they made this election "I would have the benefits for the rest of my life" and my spouse "would receive the benefits for the rest of her life." Pet. App. 15a (dissent of Judge Heaney quoting testimony of Larry McFarland).

In addition, in 1976, a provision was added to Appendix F to provide "separation retirees"—workers between the ages of 50 and 54 who, upon a plant closing, elected a "separation pension"—with health care coverage which would continue for five years at which time these individuals would then qualify for normal retiree coverage.

None of the agreements contained any provision reserving to Morrell a right unilaterally to modify the terms of the retiree health coverage. To the contrary, in 1983 language was added to the preamble to Appendix F under which the Appendix would be "subject to termination, modification, or extension upon the termination of [the] Master Agreement," but that language specifically excluded Section B, the section specifying the retiree benefits. And, none of the agreements expressly addressed the interplay between the agreements' durational provisions and the provisions defining the time periods for which retirees and their families would be covered by health insurance.

Pursuant to these agreements, from 1967 forward, every hourly employee who retired received health benefits from Morrell from the time of retirement until death. Since 1979, the surviving spouse of each retiree who elected a survival pension likewise was provided retiree health benefits from Morrell until death or remarriage.[3] The retirees and their spouses received these benefits without interruption even though the agreements terminated on several occasions during this period, and even though the health benefits of the active employees were suspended during strikes against Morrell.

In March, 1991, after succeeding in collective bargaining with the Union in negotiating away health care coverage for future retirees, Morrell sent a letter to those who had retired under the prior agreements stating that "The Company reserves its legal rights, at its sole dis-

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[3] Until 1979, Morrell maintained separate retiree health packages for retirees depending upon when the individual retired and reflecting the benefits that had been negotiated as of the time of retirement. In 1979, Morrell and the Union agreed to a single retiree plan which had the effect of improving the benefits for some retirees. Additional improvements took place in subsequent years. In 1983, the parties negotiated improvements in some areas but also agreed to modifications that were also made in the plan for the active employees and that provided certain new deductibles and co-insurance requirements.

cretion, to alter, modify, or terminate any plan or benefit at any time." In December, 1991, Morrell announced the first unilateral reduction in retiree health benefits.

On the very day that Morrell announced this reduction, the Company instituted this declaratory judgment action. Named as defendants were both the Union and Bernard Aning, a Morrell retiree, who was sued "individually and on behalf of a [defendant] class" consisting of all individuals who had retired under one of the collective bargaining agreements providing for retiree health insurance.

Proceedings Below

The district court held a four-day bench trial at which the parties presented conflicting evidence regarding their intent in negotiating the various agreements and at which the petitioners presented undisputed evidence regarding the parties' course of dealings under those agreements. Following the trial, the district court ruled for the Company, concluding that the retirees "do not have vested . . . benefits" and that "Morrell may unilaterally change or eliminate existing benefits." Pet. App. 53a. Petitioners appealed, and a divided panel of the Eighth Circuit affirmed.

The panel majority began its opinion by outlining what it understood to be the "Governing Legal Principles":

> ERISA [the Employee Retirement and Income Security Act, 29 U.S.C. § 1001 *et seq.*] requires that pension plans meet minimum vesting standards. But vesting is not mandatory for "employee welfare benefit plans"—plans that offer the health care benefits here at issue. An employer may unilaterally modify or terminate health benefits "absent the employer's contractual agreement to the contrary," even if some benefits have been paid. Thus, although ERISA is the governing law, this case turns on whether vested health benefits were contractually conferred in the Master Agreement between Morrell and the Union. The Union has the burden of proof on this issue. [Pet. App. 3a; citations omitted]

The panel majority went on to observe that "Appendix F, which contained the health care benefits here at issue, had no express vesting provisions" and that the Union was arguing that "an intent to confer vested benefits" could be inferred from the language and history of the Appendix. The majority read ERISA to place upon the Union "a difficult, though not impossible burden of persuasion with this argument since courts are reluctant to read more benefits into an ERISA plan than its plain language confers." Pet. App. 3a-4a.

The panel majority proceeded to examine the contractual language and bargaining history through the lens set forth in its "Governing Principles" discussion emphasizing the "absence of any explicit vesting language" which the majority viewed as "strong evidence of the parties' intent to limit retiree benefits to the term of the Master Agreement," Pet. App. 10a, and the "term of the Master Agreement," Pet. App. 10a, and the "term clauses that are inconsistent with vesting," Pet. App. 12a. The majority dismissed the significance of the fact that Appendix F permitted modifications "other than as provided under Section B"—the retiree provisions—because "there is no general reference to vesting in Section B." *Id.* And, the majority viewed the provision under which coverage "shall continue" either until the month of the retiree's death or beyond for dependents as "ambiguous" and insufficient to "overcome the other provisions." *Id.*[4]

Senior Judge Heaney dissented. Judge Heaney rejected the majority's view that the petitioners bore a "difficult . . . burden"; in his view, the "burden is no greater and

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[4] The panel majority thus interpreted the Agreement as creating "limited vested retirement health benefits" for a five-year period for the "separation retirees" but as creating no vested rights for those—including the separation retirees—who reached normal retirement. Pet. App. 12a. And, the panel majority concluded that retirees who elected the survivor spouse option secured for their spouse only "whatever non-vested retiree health benefits Morrell provides from time to time." *Id.*

no less than in any other contract case." Pet. App. 14a. Whereas the majority emphasized the absence of express vesting language, Judge Heaney stressed that "the agreements failed to include a single provision that informed the Union, the active employees, or the retirees that the four-decade practice of providing health benefits could be discontinued at the end of any collective bargaining agreement." Pet. App. 20a. Judge Heaney concluded:

> For four decades Morrell and the Union negotiated retirees' health benefits. In 1991, for economic and competitive reasons, Morrell decided to charge retirees for health benefits. Were it not for its bargain with the Union to continue to provide health benefits to retirees, it would have a right under ERISA to make that change. Morrell certainly had the right to make this decision with respect to future retirees, but not with respect to employees who had already retired. Morrell made the bargain, and no court may refuse to enforce this bargain which was entered into freely and which cost active employees higher wages and better working conditions, which they agreed to because they were concerned about hospital and medical bills for themselves and their spouses after they retired. [Pet. App. 26a]

Petitioners filed a timely petition for rehearing which was denied by the court of appeals on January 17, 1995. Pet. App. 54a.

Immediately thereafter Morrell announced the complete termination of health benefits for all retirees.

REASONS FOR GRANTING THE WRIT

THERE IS A DEEP AND IRRECONCILABLE CIRCUIT CONFLICT ON THE GOVERNING FEDERAL LABOR CONTRACT RULES AS TO WHEN RETIREE HEALTH INSURANCE PROVISIONS CREATE AN ACCRUED OR VESTED RIGHT

I.

A. Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, is that rarest of labor statutes: a provision with one, clear cut, indisputable objective—the decision of collective bargaining agreement suits according to a "single body of federal law." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). Congress' single-minded focus on achieving "interpretive uniformity and predictability," *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985), was such that § 301 not only authorizes the development of a federal common law of labor contracts but also requires the state courts to apply that law. *Lucas Flour*, 369 U.S. at 104. Indeed, § 301's "pre-emptive force" is so "powerful" as to "displace[] all state actions for violations of contracts between an employer and a labor organization." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 55 (1987). And, this rule extends even beyond actions for breach of a labor contract to any "state law claim [whose resolution] is substantially dependent upon the analysis of the terms of an agreement made between the parties in a labor contract." *Id., quoting Allis Chalmers Corp. v. Lueck*, 471 U.S. at 220.

B. In terms of the human and financial stakes involved—as well as the sheer volume of litigation—no class of § 301 suits is more significant today than the one growing out of contractual provisions to provide health insurance to retirees.[5] And, in no class of cases

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[5] As we show *infra* at 18-19, the well-being of millions of retirees —and the disposition of millions of dollars in corporate resources— turns on whether collectively-bargained entitlements to retiree

have the courts of appeals fallen so short of achieving § 301's goal of a "single body of federal law."

As we show below, there is now a deep and irreconcilable conflict among the circuits as to the governing labor contract rules in determining whether collectively bargained promises of retiree insurance create rights which accrue or vest upon retirement. The Sixth Circuit, joined by the Fourth, has formulated one interpretive rule; the Eighth Circuit, along with the Fifth Circuit, has expressly rejected the Sixth Circuit's rule and has formulated a directly contrary one; and the Seventh Circuit has formulated yet a third rule.

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health insurance create accrued or vested rights. Not surprisingly, therefore, this issue has generated the large volume of federal court of appeals decisions collected below:

See, Steelworkers v. Textron, Inc., 836 F.2d 6 (1st Cir. 1987); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3rd Cir. 1984); *Keffer v. H.K. Porter Co., Inc.*, 872 F.2d 60 (4th Cir. 1989); *Paperworkers v. Champion International Corp.*, 908 F.2d 1252 (5th Cir. 1990); *Autoworkers v. Yard-Man Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007; *Autoworkers v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1987); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1983); *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir. 1985); *Smith v. ABS Industries, Inc.*, 890 F.2d 841 (6th Cir. 1989); *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2992; *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (en banc), *cert. denied*, 114 S.Ct. 291; *Food and Commercial Workers Local 150-A v. Dubuque Packing Co.*, 756 F.2d 66 (8th Cir. 1985); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988) *cert. denied sub. nom. Anderson v. Slattery Group, Inc.*, 489 U.S. 1051 (1989); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984); *Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096; *Stewart v. KHD Deutz of America*, 980 F.2d 698 (11th Cir. 1993). *Cf. also In re Chateaugay Corp.*, 945 F.2d 1205 (2d Cir. 1991), *cert. denied sub. nom. UMW 1994 Benefit Plan v. LTV Steel Co.*, 112 S.Ct. 1167 (1992); *Mine Workers District 17 v. Allied Corp.*, 765 F.2d 412 (4th Cir. 1984), *cert. denied*, 473 U.S. 905; *Mineworkers District 29 v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985), *cert. denied*, 485 U.S. 935.

The result of this conflict is, in Circuit Judge Frank Easterbrook's words, that "uncertainly now reigns. . . . Employers with national operations are subject to multiple and inconsistent rules, compounded by the uncertainty inherent in sending big-stakes questions to the constantly-changing panels that are juries." [6] Thus, as William Kilburg, former Solicitor of Labor and current editor-in-chief of the Employee Relations Law Journal, has written, "It is time for the Supreme Court to weigh in" to resolve what Kilberg terms, "the growing chasm among the circuit courts on the duration of retiree welfare benefits." [7]

C. Our contention here is not novel; indeed, it has been put before this Court in a succession of *certiorari* petitions in recent years as the conflict among the circuits has unfolded. Successive respondents have met those petitions with the rejoinder that the evident lack of uniformity in the retiree health insurance litigation outcomes is the product not of conflicting legal rules but of nice—and legally significant—differences in the fact pattern of the cases.

It has not been difficult to give that counter a certain plausibility. After all, the contract law's aim is to give effect to the parties' agreed-upon rules, not to create uniform public law rules that apply regardless of the parties' desires. And, disputes over what an agreement means are normally generated by contract language that is less than crystal clear and must be resolved against negotiation and implementation backgrounds that have some variation from case to case.

Be all that as it may, the reality is that the *experts* on this point—the lawyers who litigate these cases—know, have now stated to the world, and are now acting

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[6] *Bidlack v. Wheelabrator Corp.*, 993 F.2d at 620 (dissenting opinion).

[7] Kilberg, *Retiree Welfare Benefits, Part III*, 19 Empl. Rel. L.J. 175, 177 (1993).

on their knowledge that, as union-plaintiffs attorney William Payne has written, "Until the Supreme Court speaks on this issue, the outcome of important cases will frequently depend on the circuit in which the case is brought." [8] As a result, in the words of management attorney Michael Melbinger, "a canny litigator can obtain a considerable advantage by careful choice of the forum for litigation." [9]

The instant case provides a paradigm illustration of how "canny litigators" are able to devise artful ways of controlling the choice of forum. Morrell's lead counsel in this case has urged employers to file a declaratory judgment suit "in an advantageous forum" before retirees or the union are able to move to enforce their contract.[10] Heeding this advice, Morrell took the extraordinary step of filing this lawsuit as a defendant class action, naming one retiree, Bernard Aning, as the alleged representative of a defendant class consisting of all the retirees and their dependents. Leaving nothing to chance, Morrell raced to court on the very same day that it acted to reduce the retiree benefits.

In filing suit, Morrell made no pretense that it was seeking a declaratory judgment to enable the Company to determine how to proceed vis-a-vis its retirees. To the contrary, the letter Morrell sent to the retirees on the day the lawsuit was filed announced that the Company already had concluded that it was not bound to continue the retirees health insurance in force. The purpose of this lawsuit, then, was not to inform Morrell's conduct but to preempt the retirees from filing a suit of

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[8] Payne, *Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits: A Plaintiff's Perspective*, 10 Lab. L.J. 91, 119 (1994).

[9] Melbinger & Culer, *The Battle of the Result Belt: Employers' Right to Modify the Medical Benefits of Retirees*, 5 DePaul Bus. L.J. 139, 161 (1992).

[10] Boies & Ross, *The Struggle Over Retiree Medical Benefits: Who's on Top*, 19 Emp. Rel. L.J. 169, 185 (1993).

their own, which they no doubt would have filed in the Sixth Circuit where Morrell is headquartered. Indeed, in interviews with *The Wall Street Journal*, Morrell's lawyers acknowledged as much:

> McDermott Will, knew that the eighth federal judicial circuit . . . has been more favorable to employers in such cases than has its judicial counterpart in Ohio, where Chiquita [Morrell's parent company] is based. Suing in South Dakota also increased the chances of getting a "pro-business" judge, says Michael Melbinger, a McDermott Will lawyer working on the Morrell case. [*Wall Street Journal*, February 24, 1993 at 1]

This is precisely the state of affairs that § 301 was enacted to prevent. As we show below, the instant case provides the appropriate occasion for this Court to provide the order and uniformity that is so sorely needed.

II.

A. LMRA § 301, as we noted at the outset, is a "congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 209. Absent such "uniform law . . . individual contract terms might have different meanings" in different jurisdictions, and that "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Id.* at 211.[11]

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[11] The *Lueck* Court elaborated:

> Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation . . . would tend to stimulate

It is the principal office of the federal courts, in effectuating the "congressional mandate" of § 301 to formulate interpretative rules to guide the determination of common and recurring questions arising as to "the meaning given a [labor] contract phrase or term." *Allis-Chalmers v. Lueck*, 471 U.S. at 211. And, when the lower federal courts divide as to the appropriate rules to be applied, it becomes the responsibility of this Court to assure the "interpretive uniformity and predictability," *id.*, that is § 301's *raison d'etre*.

Such a division exists today as to whether collectively-bargained provisions for retiree insurance require that those who retire under the contract continue to receive their benefits after the contract expires.

The background law for resolving this issue is stated in *NLRB v. Litton Financial Printing Division*, 501 U.S. 190, 206 (1991): "Rights which accrued or vested under [an] agreement will, as a general rule, survive termination of the agreement." But that principle's significance turns on the content given the concept of "accrued or vested" rights. And, the courts of appeals are split into warring camps over the interpretive rules to be applied to determine whether retiree health provisions create such rights.

B. In the Sixth Circuit, the rule is that "normally retiree health benefits are vested." *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d at 672. This rule is derived from the decision in *Auto Workers v. Yard-Man, Inc., supra*, which reasons that, "when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." 716 F.2d at 1482.

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and prolong disputes as to its interpretation . . . [and] might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes." [471 U.S. at 211, *quoting Teamsters Local v. Lucas Flour Co.*, 369 U.S. at 103-04].

The *Yard-Man* rule rests on two bases. First, *Yard-Man* recognizes that retiree benefits "are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained." *Id.* Second, *Yard-Man* emphasizes the legal context in which, under the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. retiree insurance entitlements are negotiated:

> Benefits for retirees are only permissive not mandatory subjects of collective bargaining. [*Allied Chemical & Alkali Workers v.*] *Pittsburgh Plate Glass Co.*, 404 U.S. [157,] 181-82 [(1971)]. As such, it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations. The employees are presumably aware that the union owes no obligation to bargain for continued benefits for retirees. If they forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements. 716 F.2d at 1482.

This context, the Sixth Circuit concluded, "demonstrates the likelihood that continuing insurance benefits for retirees were intended." *Id.*

In its most recent decision on point the Sixth Circuit crystallized its position as follows: "Because [retiree] benefits are deferred compensation, it is unreasonable to suppose that the parties to the collective bargaining agreement intended to permit [the employer] to terminate the retirement insurance program unilaterally." *Armistead v. Venitron Corp.*, 944 F.2d at 1297.

The Eighth Circuit takes the opposite position. In *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d at 1517, that court expressly stated: "we disagree with *Yard-Man* to the extent that it recognizes an inference of an intent to vest." The Eighth Circuit reasoned that the

interpretive rule to be applied to this class of cases should be fashioned from what that court understood to be the policies underlying the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). *Anderson's* main point is that:

> Congress explicitly exempted welfare benefit plans from ERISA's vesting requirements. It therefore seems illogical to infer an intent to vest welfare benefits in every situation where an employee is eligible to receive them on the day he retires. [836 F.2d at 1517][12]

In the instant case, the Eighth Circuit pushed its ERISA analysis further. Beginning again from the proposition that under ERISA, "vesting is not mandatory for 'employee welfare benefit plans'—plans that offer the health care benefits here at issue," the court below drew the conclusion that absent "express vesting provisions" the "Union shoulders a difficult, though not impossible, burden of persuasion . . . since courts are reluctant to read more benefits into an ERISA plan than its plain language confers." Pet. App. 3a-4a. And, in holding that the Union had failed to shoulder this burden here, the Eighth Circuit relied heavily on the absence of any express vesting language, *see supra* at 5-6.[13]

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[12] The *Anderson* court purported to distinguish the Eighth Circuit's early decision in *Local No. 150-A v. Dubuque Packing, supra.* That case, while not citing *Yard-Man,* had followed the Sixth Circuit's approach, reasoning that the right to retiree benefits "arises from the retiree's status as a past employee" and this status "cannot be affected by future negotiations or agreements between the Company and the Union." 756 F.2d at 70. That the *Anderson* court took a decidedly different approach is perhaps best evidenced by the fact that in the instant case—which, like *Dubuque,* involves contracts negotiated through pattern bargaining in the meat packing industry and in which, as Judge Heaney noted, "the [contractual] language . . . is identical to that in *Dubuque Packing,*" Pet. App. 21a—the result is the opposite of the result in *Dubuque.*

[13] In support of its allocation of the burden of persuasion quoted in text, the court below cited three cases, each of which involved interpretation of unilateral employer-created ERISA plans, not

The courts of appeals have begun to choose up sides in this Sixth Circuit-Eighth Circuit disagreement. The Fourth Circuit has aligned itself with the Sixth Circuit, stating that the *Yard-Man* rule is "consistent with a more far-reaching understanding of the context in which retiree benefits arise." *Keffer v. H.K. Porter, Inc.*, 872 F.2d at 64. The Fifth Circuit sides with the Eighth Circuit:

> To the extent that *Yard-Man* held that there is, as a general proposition, an inference of an intent to vest retirement benefits, we find merit in the Eighth Circuit's criticism in *Anderson* of this aspect of *Yard-Man* and find no basis in logic or federal labor policy for such a broad inference. [*Paperworkers v. Champion Int. Corp.*, 908 F.2d at 1261-62] [14]

The Seventh Circuit has added to the disarray in the circuit law. In *Bidlack v. Wheelabrator Corp., supra*, that court, sitting *en banc*, split three ways, with three judges expressly supporting *Yard-Man* and arguing for a rule which would "presume that benefits vest," 993 F.2d at 611-12 (Cudahy, J., concurring); four judges adopting

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collective bargaining agreements. Pet. App. 4a. These citations illustrate that the considerations of labor policy that weighed so heavily in *Yard-Man* play no role in the Eighth Circuit's analysis.

There is more than a little irony in the Eight Circuit's reliance on ERISA to justify its no-vesting rule. Prior to the enactment of ERISA, it was generally well-settled that even retirement benefits that were unilaterally created by an employer become vested contractual rights promises of retiree upon retirement. *See* B. Aaron, *Legal Status of Employee Benefit Rights Under Private Pension Plan*, 9-10, 13-14 (1961). Thus here, as in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989), the decision below "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted" notwithstanding the fact that "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans."

[14] The Eleventh Circuit in *Stewart v. KHD Deutz*, 980 F.2d at 702 n.3, contented itself with noting the split in the circuits while finding it unnecessary in that case to state its preference.

what amounts to the Eighth Circuit rule that "the contract must either use the word 'vest' or must state unequivocally that it is creating rights that will not expire when the contract expires," *id.* at 616 (Easterbrook, J., dissenting); and a three-judge plurality announcing an in-between rule which rejects both any presumption of vesting but also any requirement of express vesting language, *id.* at 607-08 (Posner, J.).[15]

The short of the matter, then, is this. There is, at the least, a Sixth Circuit *Yard Man* rule (followed in the Fourth Circuit), and a counter Eighth Circuit *Anderson* rule (applied in this case and followed in the Fifth Circuit). And, it is fair to say that there is also a Seventh Circuit *Wheelabrator* rule that is different from both.

To be sure, none of these rules is absolute. As we have noted, within wide limits, contract law is a law of party sovereignty whose aim is to effectuate the parties' agreement. But, as § 301 recognizes, interpretive rules *do* matter. That is why Congress decided that those rules must be *uniform*. And, that congressional decision is particularly to the point where, as here, the § 301 interpretative rules are outcome determinative: in the Sixth Circuit, the *Yard-Man* inference almost always carries the day and collectively-bargained promises of retiree benefits are consistently interpreted to create accrued or vested rights;[16] in the Eighth Circuit, such promises do

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[15] The confusion in the Seventh Circuit is perhaps best evidenced by the fact that the judges in *Bidlack* could not agree as to the continuing vitality of a prior panel decision in *Senn v. United Dominion Industries, supra. Compare Bidlack*, 933 F.2d at 610 ("*Senn* and its default rule now do seem to me to be a dead letter") (Cudahy, J., concurring) *with id.* at 616 ("[a] majority of this court . . . reaffirms *Senn*" (Easterbrook, J., dissenting).

[16] That was the result not only in *Yard-Man* but also in *Autoworkers v. Cadillac Malleable Iron Co., supra*; *Policy v. Powell Pressed Steel Co., supra; Weimer v. Kurz-Kasch, Inc., supra; Smith v. ABS Industries, Inc., supra*; and *Armistead v. Vernitron Corp., supra.*

not have that effect.[17] This is precisely the result § 301 was enacted to prevent.

C. The practical consequences of this conflict could not be more profound. There are, today, upwards of 3,000,000 retirees (and many more dependents) who receive retiree health insurance coverage pursuant to a collective bargaining agreement.[18] Whether these individuals are entitled to their health benefits throughout their retirement—or whether, *per contra*, employers can reduce retiree benefits and the attendant employer liabilities—depends upon where "canny litigators" are able to maneuver a lawsuit. *See supra* at 9-11.

In addition, there are, today, upwards of 4,000,000 active employees over the age of 45 whose collective bargaining agreement provides for health insurance upon retirement.[19] Whether these individuals will have a vested right upon retirement depends upon the court that makes the decision.

From the employer perspective, it is fair to say that the cost of retiree health insurance is "material" in the

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[17] That was the result in *Anderson* and in the instant case.

[18] According to the Employee Benefit Research Institute's calculation from the August, 1988 Current Population Survey, there were in 1988, 10,358,000 retirees covered by their former employer's health plan. EBRI, *Retiree Health Benefits* (1991). While this analysis does not separate out union and non-union retirees, it is a fair assumption that the proportion of retirees whose insurance was collectively bargained is at least as great as the proportion of current employees whose entitlement to retiree health care was collectively bargained. *See infra* at n.19.

[19] Employee Benefit Research Institute, *Employment Based Health Benefits: Analysis of the April 1993 Current Population Survey*, Table 14. This report shows that 3,300,000 union members work under contracts which provide for employer-paid retiree health insurance and that information is not available on another 1,400,000 union members. The estimate in text assumes that the latter group enjoy retiree benefits to the same extent as the group for whom information is available.

accountants' sense of that term. The accrued liabiilty of all employers for retiree health insurance has been estimated at as much as $500 billion and a substantial share of that is generated by collectively bargained agreements.[20] It is not surprising, therefore, that so many employers are seeking to reduce or zero out that cost. Nor is it surprising that these employers pay and pay well for aggressive lawyering that secures a favorable forum.

Section 301's point is that the meaning of even an "unimportant" provision of a collective bargaining agreement provision should not turn on the law of the forum in which that question is litigated. Whether that is hopeless idealism or not, given the enormous stakes that are involved here—both for the retirees and their dependents whose access to affordable medical care is at stake and for the employers for whom providing retiree health insurance is such a substantial cost—the instant class of cases is the last class in which decisions of employee rights and employer duties should be allowed to turn on such vagaries

All that being so, we submit that the time has come for this Court to resolve the circuit conflict that obtains and determine the appropriate § 301 rule governing the interpretation of collectively-bargained promises of retiree health insurance.

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[20] Deloittle & Touche, *Retiree Benefits: Tackling a Complex Issue* p. 1 (1990).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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